IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. [redacted]85

LEWIS M. HAUPT

v.

THE UNITED STATES.

BRIEF FOR APPELLANT.

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THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

SUBJECT INDEX.

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The subject of the controversy brought by this appeal from the Court of Claims is a design, patented by appellant, to scour automatically a channel for navigation, and the utilization of that design by the Government in improving the harbor of Aransas Pass, Texas. The design, in the particulars that it called for a single jetty and that no means other than the jetty itself were to be employed for dredging the channel, marked a radical departure from the traditions of Government engineering. This innovation, like the projects and methods devised by James B. Eads, C. P. Goodyear and other free-minded engineers, encountered opposition from the Corps of Engineers of the army; and the record of this case is in large part the history of competition between the "Haupt" design and the classical plan of twin jetties, with auxiliary dredging, to which the faith of the Corps was pinned.

The claimant in this case is a distinguished civil engineer, best known to the general public as a member of the first Isthmian Canal Commission. Graduated

from West Point, he served his novitiate as a practicing engineer in the Corps of Engineers of the army. For the better part of that period he was assigned to the hydrography of the Great Lakes and Texas coast and to other duties connected with river or harbor improvements of that region. Promotions in the engineer corps having been suspended by law, Lieutenant Haupt resigned his commission in September, 1869. For a time thereafter he served as an assistant examiner in the Patent Office. Thereafter he was engaged in the active practice of his profession and in technical authorship and for twenty years of the time was Professor of Civil Engineering in the University of Pennsylvania.

Mr. Haupt in his contact with problems of channel protection and improvement very soon received the impression that the established methods of maritime engineers involved unnecessary expense in jetty construction and in the subsequent maintenance of the channel; but neither in the War Department records nor at the Patent Office could he find that any form of structure had been devised by which this waste might be retrenched. He therefore, after many years of study and travel, worked out, and then patented, a design for a single jetty which would automatically—without the aid of dredging—create and maintain a channel. The jetty was to consist, according to the problems of the particular locality, of a compound or reversed curves, applied separately or in combination, and the scour was to be effected by the impinging of the seaward current upon the concave face of the jetty and by the reaction thereby caused of such nature as to disseminate the obstructing sand and distribute and deposit it traversely outside of the channel; the size of the jetty and its degree, or degrees, of curvature also to be determined by the local considerations.

Aransas Pass, Texas, known to Mr. Haupt through his

studies of the geography, the hydrography, the wind and tide conditions, etc., of that coast, suggested itself to him as an available situs for a demonstration of his design. This inlet was especially recommended by the fact that several attempts had already been made there, without success, to create a commercial channel and another attempt was in the making. The Government had in the years 1883-1889 spent more than half a million dollars on a jetty designed by engineers of the corps, but the result was so disappointing that upon the recommendation of a special board in the corps the project was abandoned and the appropriations of Congress centered upon Galveston as the one harbor of that coast to be improved. Consequently a corporation, styled the Aransas Pass Harbor Company, was organized and, by leave of Congress, constructed a wooden jetty, which also proved inefficient. This company having failed, a new corporation of the same name took up the work of improving the pass and harbor. The managers of the new company examined and were impressed with Mr. Haupt's patented design. He put it on paper for them in the form of a reverse curve, adjusted to the physical conditions and the funds of the company, drew specifications with the like aim and offered the plan for their use free of royalty or other compensation to him except a $500 retainer fee. The offer was accepted and the construction proceeded, as planned, at a rapid rate until the old Government jetty was discovered to be obstructing the scour and the company had exhausted its resources. Congress then required the company to convey the work which had been done to the Government as a condition precedent to the continuation of the improvement. A preliminary small appropriation was made in 1899 for removal of the old Government-built ("Mansfield") jetty, but the money was never applied to this purpose (Rec., p. 17). In 1902 the Senate Committee on Com-

navee, when considering a river and harbor bill, deemed that the time had arrived to fix permanently a plan for developing the Aransas Pass channel. Mr. Haupt appeared before the committee with models and other explanatory exhibits, having had a hearing already before the proper House committee, and General McKenzie, soon to be Chief of Engineers, was present to speak for the corps, which had always been unfriendly to the Haupt design. The committee showed themselves favorably disposed toward Mr. Haupt's ideas and were discussing a proposal made by him that he should have a contract to complete the jetty for the lump sum of $500,000 with a waiver by him of all claim for royalty and a guaranty, by bond, of success in creating and maintaining the channel. General McKenzie then suggested that even though the Haupt design be adopted the construction would better be done in the usual way, *i. e.*, by the engineers awarding contracts and supervising the performance of the same. The committee and Congress accepted this view. While the Haupt plan was adopted, an appropriation was made of only $250,000, on which an initial contract might be let by the engineers. The text of the appropriating clause was:

> "*Improving Aransas Pass, Texas.*—Continuing improvement $250,000; *Provided*, That the work at this harbor shall be confined to the completion of the north jetty in accordance with the design and specifications of the Aransas Pass Harbor Company and in continuation of the work heretofore carried out on said jetty by said company, and to such additional work as may be necessary for strengthening such jetty, and for the removal of such part of the old Government jetty and any other hard material which may interfere with the formation of a channel by the natural action of the current" (Rec., p. 19).

Upon invitation of the District Engineer in charge, having his office at Galveston, Mr. Haupt aided in the preparation of the specifications for the contract to be let by the Department under this appropriation. He also concerned himself that there should be a bid on the work at low enough prices to meet any scruples of the engineers. Conferring with Maj. Henry C. Ripley, another engineer of high rank, he arranged that Ripley would put in a bid; Haupt agreeing to lend Ripley the money needed to buy his plant and carry on the work until he should begin to receive his pay. That agreement was carried out. Ripley, being the lowest bidder, got the contract, and Haupt furnished him the funds for the earlier stages of the work.

When the proposition of a recession by the Aransas Pass Harbor Company to the Government was under consideration, Mr. Haupt wrote to the President of the company and to the chairmen of the committees of Congress letters admonishing them that the personal license held by the company for the use of the patented design would not pass to a grantee of its property; and this license was not included in the subject-matter of the release to the Government, which was finally effected by a deed of the company executed in 1899. Mr. Haupt, when he appeared before the Senate Committee, made clear his reservation of his right to be paid fair compensation by the Government, in the event of the continued development of the harbor and the use therein of his design, unless he were given a contract, of the tenor stated above, embracing the whole work (Rec., p. 19).

When work under the Ripley contract ceased (the jetty having been built from the two ends successively) there remained in the middle a gap of about 1600 feet. The construction was completed, under two successive appropriations and contracts for $100,000 each, during

the years 1904, 1905 and 1906 by the contracting firm of Clarke & Company; the central gap being closed in June, 1906 (Rec., p. 20).

The engineers of the corps had not abated their hostility to the Haupt design. A board of engineers in a report to the Chief of Engineers of December 6, 1906, had suggested that sufficient time had not elapsed to test the Haupt design; but the District Engineer then in charge, Major Jadwin, had already recommended a return to the two-jetties plan and the connection of the Haupt jetty with St. Joseph's Island, the nearest land, and in a second report, of date December 22, 1906, the board concurred in this recommendation, submitting a detailed plan with an estimate of $1,288,499.50 as the cost of the additional construction proposed. One feature of this new plan was the tearing out of 1,000 feet of the seaward end of the Haupt jetty and its reconstruction on a straight line, instead of a curve. The recommendation and estimate also included $75,000 per annum for dredging the channel (H. R. Doc. No. 5, page 5, 59th Cong., 2d Sess., Rec., p. 2). The engineers had their way this time, and an appropriation was made toward carrying out their plan. Subsequently there was some slight modifications of this plan, made upon the recommendation of Major Jadwin, and additional appropriations. Upon these plans the opening between the Haupt jetty and St. Joseph's Island was closed in February, 1909, and construction proceeded, under successive contracts, on the construction of another jetty, some 1,300 to 1,700 feet south of the Haupt jetty, built out from the land bounding the pass on that side, viz., Mustang Island; but the Haupt jetty itself was never touched except to maintain its crest—no part of the proposed tearing out and realignment at the outer end was done. As for the dredging of the channel, no need therefore had been found by the engineers until 1912, or after the

new construction proposed by them had been in considerable part performed, and so for about six years following the closing of the central gap in the Haupt jetty no part of the appropriation was used for dredging (Rec., pp. 21, 23, 24).

As the construction of the Haupt jetty had proceeded the channel had deepened progressively. In the summer of 1906, just after the closing of the central gap, the depth available for navigation was over 16 feet, in a narrow channel. By 1908, there was a channel 100 feet wide. The improvement continued, so that by 1912 sea-going vessels of good size came in to carry away cargoes, chiefly of cotton and oil. The Texas Railway Commission in July, 1912, recognized Aransas Pass as a commercial port, and, by giving it railroad rates to compete with water rates, put it on a parity with Galveston (Rec., p. 23).

Claimant's case is that the jetty constructed upon his patented design is the agent which has developed this channel; that nothing but harm has come from the additional works constructed by the Government since 1907. A defense which Government counsel attempted to establish is that the Haupt jetty has not accomplished any substantial results; that its influence has been rather to block than to clear the channel.

The petition, however, upon a second hearing, was dismissed by the court on the ground (determined by it to be jurisdictional) that Congress did not adopt appellant's design and did not express any intention that he should be paid for the use of the design which was adopted.

Assignment of Errors.

Error, committed by the Court of Claims, is hereby assigned as follows:

(1) In not holding that the legislation by which Congress adopted appellant's design, for use in the Aran-

sas Pass harbor, obligated the United States to pay appellant the value of the design for that use.

(2) In holding that Congress, in enjoining the War Department to apply appellant's design in the continued improvement of Aransas Pass harbor, as an alternative to the acceptance of the offer made by appellant to its committees to complete said improvement for compensation named by him with waiver of claim of royalty, did not bind the United States to pay appellant the value of his design when applied by the method of letting the work to an outside contractor.

(3) In not holding that, when Congress adopted for continued use in the Aransas Pass improvement a design of which appellant was patentee and did not express an intention that he should not be paid for the use of the design and did deny that the design was covered by the terms of the patent nor that the patent was valid, the United States was pledged to pay appellant for the use made, as contemplated, of the design.

(4) In not holding that, regardless of all question of a valid patent held by appellant, Congress, in adopting his ideas and plan for such continued harbor-improvement, obligated the United States to pay him the value of such ideas and plan so applied.

(5) In holding that in naming "the design and specifications of the Aransas Pass Harbor Company" for such continued harbor-improvement Congress did not adopt appellant's patented design.

(6) In not proceeding to ascertain the value to the United States of the results accomplished by the jetty completed under such authorization of Congress and to render judgment in appellant's favor for the amount so ascertained.

(7) In not proceeding to ascertain the value to the United States of all results accomplished after such authorization by Congress, by all the construction done, in

said harbor, including the jetty so authorized and other structures afterward erected, and if it were not possible to distinguish and separate the results effected by said jetty from those effected by such later structures, to render judgment in appellant's favor for the entire amount so ascertained.

(8) In not rendering judgment in appellant's favor for the amount of expense of dredging in the harbor saved solely by the jetty so authorized.

(9) In dismissing the petition.

Propositions of Law.

An act of Congress for taking or using private property or for employing the services of an individual, when enforced or complied with, becomes a contract for the payment by the United States of the identical compensation specified, or, if none is specified, for reasonable compensation.

United States *v.* Great Falls Mfg. Co., 112 U. S., 645 (656).
United States *v.* Cress, 243 U. S., 316 (329).
Davis *v.* Gray, 16 Wall, 203.
Glavey *v.* United States, 182 U. S., 595.

Whether the terms of a statute are explicit and clear or general and ambiguous the court, if possible, must ascertain and give effect to the intention of the legislators, if necessary supplying words or substituting words for others inadvertently used.

Stephens *v.* Cherokee Nation, 174 U. S., 445.
Wisconsin Central R. R. Co. *v.* Forsythe, 159 U. S., 46 (56, 57).
Chesapeake & Potomac Telephone Co. *v.* Manning, 238 U. S., 186 (245, 248).
Chicago, St. Paul, etc., Ry. Co. *v.* United States, 217 U. S., 180 (187, 188).

Lau Ow Bew *v.* United States, 144 U. S., 47.
Brackett *v.* Chamberlain, 115 Me., 335.
State *v.* Barnett, 173 N. C., 750.
State *v.* Missouri Pacific Ry. Co., 262 Mo., 720 (730).
Lewis's Sutherland on Statutory Construction, Secs. 363, 374, 381, 382.

If a statute is not clear on its face the courts in interpreting it will search committee reports or other legislative proceedings for expressions or indications of the intentions of the legislative body.

St. Louis Iron Mountain & Southern Ry. Co. *v.* Craft, 237 U. S., 648.
Tap Line Railroad Cases, 234 U. S., 1 (27).
Buttfield *v.* Stanahan, 192 U. S., 470 (495, 496).

When the United States adopts and puts to use a patented appliance, design or process and does not deny that it is using the same or that the patentee is the true owner thereof, and does not disavow a purpose to pay him for such use, it is bound to pay him reasonable compensation.

United States *v.* Societe des Anciens Etablissements Cail, 224 U. S., 309 (320).
United States *v.* Berdan Fire Arms Co., 156 U. S., 552, 567.
United States *vs.* Harvey Steel Co., 196 U. S., 310 (317, 318).
Palmer *v.* United States, 128 U. S., 262.
Pasqueau *v.* United States, 26 Ct. Cls., 509 (539).
McKeever *v.* United States, 14 Ct. Cls., 396.

When, in circumstances that render the user of a patent liable to the patentee for compensation, the patented article is used, in conjunction with other

articles, in a single device or plant, and it is apparent that such combined use has been of value to the user, but it is inherently impossible, as between the patented article and the other so associated with it, to distinguish the results accomplished by each, the patentee's compensation must be on the basis of the entire results.

Westinghouse Electric Co. *v.* Wagner Co., 225 U. S., 604.

Callaghan *v.* Myers, 128 U. S., 617 (666).

Providence Rubber Co. *v.* Goodyear. Extr., 9 Wall, 788 (802).

Walker on Patents, 5 Ed., Sec. 719, p. 816.

Argument.

The conclusion of law and opinion of the Court of Claims reduce the case to these simple issues: Did the committees of Congress, when they had heard appellant at length and seen by his models the particular application made at Aransas Pass of his design and then directed that the continuing construction in that improvement be on the "plan and specifications of the Aransas Pass Harbor Company" intend by that phrase to designate appellant's design, and, if so, should appellant in the absence of an appropriation to him in express terms be compensated for the use thereafter made of that design?

In other words, the Court of Claims decides that the legislation referred to, and its effectuation, did not amount to a contract. Appellant asserts that it did and that the United States is obligated to pay him the value of the ideas and plans in question for and in the development of the channel which by the year 1912, gave to Aransas Pass the status of a commercial port (Rec., p. 23).

Addison on Contracts (ch. 1, sec. 1, note 1), speaks of

"statutory contracts, as when an act of legislation contains a proposition which is accepted by individuals," and classes these as express contracts. If a legislative proposition and the acceptance thereof by an individual constitute an express contract, it would seem that this designation must be given to a tender made by an individual and accepted by the legislature.

But whether the contract between the United States and Lewis M. Haupt was express or implied is immaterial.

In the cases originating in this court where patentees have recovered judgment against the United States the decisions were grounded largely on the *Great Falls Mfg. Co.'s* case, 112 U. S., 645; 124 U. S., 581. There it was decided that when, under apt legislation of Congress, the Government, through a competent functionary, takes property of an individual, even without negotiation, there is an implied contract which gives the individual access to this court.

An application of this doctrine which has been quoted by the courts time and time again was made by the Court of Claims and this court in *Palmer's* case, 19 Ct. Cl., 669; 128 U. S., 262. This court in that case quoted the following, in the opinion of the Court of Claims, as conclusive of the "contract" question:

> "The claimant in this case invited the Government to adopt his patented equipments and the Government did so. It is conceded on both sides that there was no infringement of the claimant's patent, and that whatever the Government did was done with the consent of the patentee and under his implied license." (128 U. S., p. 269.)

This case and others intervening were reviewed in *United States* v. *Societe Anonyme des Anciens Etablissements Cail*, 224 U. S., 309. No more had been

contended in that case for the Government than that there must be (1) a use of the patented design with the patentee's assent, and (2) an "agreement or meeting of the minds on the part of the patentee and on the part of the user, even though the amount of the compensation be not fixed." Of this argument the court said (p. 320):

> "But these elements do not have to appear by the explicit declarations of the parties. They may be collected from their conduct. The alternative of a contract is important to be kept in mind. The officers of the Government knew of the * * * invention and were aware of its great importance, and the purpose to deliberately take property of another without the intention that he should be compensated—in other words, to do plainly a wrongful act—can not be imputed to them without the most convincing proof. Such proof does not exist in the present case."

So the court found that there was a contract and affirmed the judgment of the Court of Claims.

In *United States* v. *Berdan Fire Arms Company*, 156 U. S., 552, the Supreme Court said (p. 567):

> "In the case at bar, according to the nineteenth finding, 'Berdan, as an officer of plaintiffs herein, assignees of his inventions during the period covered by this action, was in constant communication with the ordnance officers, requesting the use of his devices by the Government; they knew him as an inventor, and knew his inventions as soon as they were patented;' and, by the twenty-third, 'plaintiffs have desired the Government should use their patented devices, and have also desired and requested compensation for such use.' So far, then, as the petitioner is concerned, the use of this invention was with its consent, in accordance with its wish, and with the thought of compensation therefor.
>
> "While the findings are not so specific and emphatic as to the assent of the Government

> to the terms of any contract, yet we think they are sufficient. There was certainly no denial of the patentee's rights to the invention; no assertion on the part of the Government that the patent was wrongfully issued; no claim of a right to use the invention regardless of the patent; no disregard of all claims of the patentee, and no use, in spite of protest or remonstrance. Negatively, at least, the findings are clear. The Government used the invention with the consent and express permission of the owner, and it did not, while so using it, repudiate the title of such owner."

The principles applied in that decision had been declared by the Court of Claims long before in McKeever's case, 14 Ct. Cls., 396.

As would appear from the quotations above, it is of no consequence that there was no apt description, in the agreement, of the design to be utilized, *if* the two parties had the one thing in mind, and it is immaterial that no price was put on the use of the design or that no method was provided for determining the amount to be paid. Here there is in point also the following from *United States* v. *Harvey Steel Co.*, 196 U. S., 310 (pp. 317, 318):

> "It is argued that the agreement was only to pay for the use of the process covered by the patent named, and that if the meaning of the parties was to cover anything broader than the patent, even what was known in their speech as the Harvey process, that meaning could be imported into the contract only by reformation, not by construction of the contract as it stands. But we are of opinion that this defense also must fail. The argument is that at the time of the contract it was supposed that the heat required for the process was greater than that actually used, that the patent was valid only for a process with the greater heat, and that the contract covers

no more than the patent. But the fact that the parties assumed that the process used and intended to be used was covered by the patent works both ways. It shows that they thought and meant that the agreement covered and should cover the process actually used. We think that this can be gathered from the agreement itself apart from the mere supposition of the parties. The contract dealt with a process 'known as the Harvey process.' It imported the speech of the parties and of the common speech of the time into the description of the subject-matter. * * * It also identified it, it is true, as a patented process, but, if the incompatibility of the two marks is more than trivial, as it was regarded by the court which found the facts with which we have to deal, the identification by personal familiarity and by common speech is more pungent and immediate than that by reference to a document couched in technical terms, which the very argument for the United States declares not to have been understood. It is like a reference to monuments in a deed. As we have said, this identification by personal experiment and by common speech is carried forward into the contract in suit. The latter contract manifests on its face that it is dealing with a process actually in use, which requires the communication of practical knowledge and which further experience may improve."

Unquestionably, in the instant case Congress intended to adopt the "process" (design and specifications) which the Aransas Pass Harbor Company had been using, and this process, in all its elements and incidents, was identified to the legislative mind as having been originated by Lewis M. Haupt.

Evidently, too, it is immaterial whether the Government has made much or little use of the patented design, or whether it has used the entire design, or

whether it has used the design in conjunction with something else not covered by the patent.

Again: if at the time when an invention was appropriated by the Government there was no other market for it, or even though, in the use made by the Government, the invention had proved inefficacious, such fact would not impeach the contract—though, of course, the results accomplished by the patented article go to the measure of the inventor's compensation.

> *James* v. *Campbell*, 104 U. S., 356, *cited in United States* v. *Palmer*, *supra* (271, 272).
>
> *Palmer's case in* 19 Ct. Cls. (p. 671).
>
> *Dahlgren* v. *United States*, 16 Ct. Cls., 30 (53).

> "What was the claimant's device worth in its market at the time it was taken? As in many of the other patent cases which have been before the court, the invention at the time of the taking had no market value, it was only likely to be used by the Government on navigable streams, and that rarely. Moreover, it had not then been actually tested in its own limited field. The question is not what experience has shown the invention to be worth, but what it was worth when the Government appropriated it."
>
> *Pasqueau* v. *United States*, 26 Ct. Cls., 509 (539).

The Pasqueau case, it will be observed, related to a water-way improvement, as does the present case. In another detail to which Pasqueau's counsel adverted (p. 532) the cases are alike. The result which Pasqueau sought was "accomplished," it was said, "by a device so simple that it causes one to wonder on seeing it for the first time (as was said of the telephone) that it had not been invented long before. This is often the case, as the Supreme Court has observed, with inventions of

the greatest merit.' *Loom Co. vs. Higgins*, 105 *U. S.*, 591."

> "The claimant here knew that his device was of little value save for military use and that the Government would be substantially the only customer. * * *
>
> "By the term 'use of the invention' is not to be understood its usefulness. The utility of the invention can not be attacked in this action; the user under patent right is the only issue in the case. Whether a newly discovered use is or is not more useful than the old one which it supplants the customer must determine for himself before he buys the patented article or uses it under the inventor's license."
>
> *Palmer's case* in 19 Ct. Cl. 67. (pgs. 670, 671).

> "We need not, however, dwell longer on the excellence of the invention. The Government has testified to its excellence by using it in the guns intended for the national defense."
>
> *Ancient Etaldinements case, sup.* (p. 323).

> "The fuller the statement should be made the more fully it would appear that the United States was dealing with a matter upon which it had all the knowledge that anyone had, that it was contracting for the use of a process, which, however much it now may be impugned, *the Government would not have used when it did but for the communications of the claimant, and that it was contracting for the process which it actually used.*" (Italics ours.)
>
> *Harvey Steel Co.'s case, sup.* (pp. 318-319).
>
> See also *Berdan case, sup.* (p. 566).

It is also decided in the Harvey Steel Co. case that it was not material whether the process bargained for and used was covered by the patent invoked; that if the Government sees fit to avail of the ideas of an inven-

tive grants he is lawfully entitled to be paid for the use made.

The sum of the decided cases is this, that if an inventor offers his invention to the Government and it is accepted and used, with no declaration by the Government's representative of a purpose not to pay for the use, and without a waiver of any sort by the inventor of his right to compensation, a contract, enforceable by suit, is created notwithstanding that the invention was not covered by a patent, and notwithstanding that some parts of the invention were not availed of, and notwithstanding that the invention when applied possessed no real utility.

Can it be disputed that all of these elements of a contract occur in the present case, which presents this peculiar feature alone, that the Government itself, i. e., Congress, not an executive agent of the Government, engaged with the inventor for the use of his ideas?

There is ample reason why Congress, in adopting the design in question, should have used the words "design and specifications of the Aransas Pass Harbor Company." It was clearly understood that claimant's design, as regards the degrees of curvature, the dimensions and the shaping of the jetty, etc., had been adjusted by him to the needs of that particular locality and of the channel to be created, and this was a problem to be solved wherever the design should be used. If the law had been written "patented design of Lewis M. Haupt," the army engineers would have been at liberty to remove the existing structure and substitute another, within the description of the Haupt patent but upon lines untried at that locus.

The committees of both houses perfectly understood what they were doing. Mr. Haupt's first proposition was made in answer to an invitation from the House committee (Rec., p. 19). The Senate committee, by

which his tender of the design was finally accepted, examined his models, learned from him and the Government engineers present, and from Departmental reports, the history of the channel-development, including the evidences that this design did the work, and, when acceding to the desire of the engineers to be entrusted with the work, and choosing phrases for the appropriation, it intended that this patented design, and none other, should be used in the completion of the improvement, and the committees could have had no other impression than that Mr. Haupt expected to receive money compensation.

If the Secretary of War had done on his own motion what Congress did—had settled upon and used the Haupt design as the best for that improvement, after the Government had taken back what Congress had formerly granted to the Aransas Pass Harbor Company, and had received notice from Mr. Haupt that his patent rights were reserved except as against the harbor company, and had *not* intimated that nothing was to be paid to Haupt for this continued and complete use of his invention—it would not be denied, we assume, that the Government was legally bound to compensate Mr. Haupt. But has the head of an executive department a power which Congress has not to pledge the money of the Government?

In the opinion of the Court of Claims it is said (Rec., p. 27) that in order to bind the United States to appellant the use made of his design must have been "under such circumstances as to indicate an intention to pay for the same." In view of the decision cited above, and others, it would seem more correct to say that the Government was bound unless the circumstances were such as to rebut the presumption that compensation was intended. Patent cases in the Court of Claims are like others in the particular that the Government is held to have promised

by implication to pay for any benefit it has received in silence from an individual. If the Government's representative denies that the person proffering a new appliance or process is the originator thereof, or on any other ground disavows intention to pay him for the use thereof, then (if he held a valid and pertinent patent), upon use made, a pure case of infringement arises—which, before the act of February 1, 1910, was not justiciable.

In relation to the attitude of appellant in his dealings with the committees of Congress, the opinion of the Court of Claims, at record pages 27 and 28, contains some inapt (doubtless inadvertent) expressions. Only in proposing to complete the jetty, as already defined, for lump compensation named by himself, under bond for successful results, did appellant assume, or seek, the "character of a contractor." Appellant's "respective propositions" were (1) that he would complete the jetty, and warrant its success, and the Government would pay him the sum named, or (2) that, if Congress should adopt his design but leave the Corps of Engineers to do the work, or to have it done, in the usual way, he should be paid the value of the design—the Aransas Pass Harbor Company having no power to convey the license he had given it for a free use.

A sufficient reason why "private rights" were "left for determination"—why no appropriation was made to appellant's benefit (Rec., p. 29)—was that the amount of his compensation was naturally deemed to depend largely upon the degree of the jetty's utility as finally demonstrated.

From the bare terms of the legislation the Court of Claims could not have determined what kind of a jetty was to be constructed; the phrase "design and specifications of the Aransas Pass Harbor Company," meant nothing to one who had no knowledge of the work which that company had done and the plan thereof. But

in the act of determining what negotiations occurred between appellant and Congress the court has learned what this phrase signifies. The information needed, that is to say, is gathered, as it may be for the purpose of interpreting any ambiguous statute (*St. Louis, Iron Mountain & Southern Railway Co.* v. *Craft*, 237 U. S., 548; *Tap Line Railroad Cases*, 234 U. S., 1, 27; *Buttfield* v. *Stranahan*, 192 U. S., 470, 495, 496) from the legislative proceedings by which the law was framed; and unquestionably it is established by those proceedings that the committees of Congress, in considering what had been accomplished at Aransas Pass and the promises of the jetty, truncated by the collapse of the harbor company, thought of the design and ideas of appellant, so utilized, and of none others. The phrase used by Congress then, was in legal effect the same as "design of Lewis M. Haupt and specifications prepared by him, which have been applied by the Aransas Pass Harbor Company."

Provided only it is clear what the words were intended to mean, it is of no importance what name a legislative body has happened to give to anything with which it dealt. The *purpose of the legislature*—this the court must seek to accomplish in applying any statute.

Stephens v. *Cherokee Nation*, 174 U. S., 445.

Wisconsin Central R. R. Co. v. *Forsythe*, 159 U. S., 46 (56, 57).

Chesapeake & Potomac Telephone Co. v. *Manning*, 238 U. S., 186 (245, 248).

Chicago, St. Paul, etc., Ry. Co. v. *United States*, 217 U. S., 180 (187, 188).

Lewis's Sutherland on Statutory Construction, Secs. 363, 374, 381, 382.

It is respectfully submitted that, if it is established that the committee of Congress which shaped the legislation of 1902 had in mind, and intended that the Government should avail of appellant's ideas and designs, a legal presumption follows that the committee expected appellant to claim and receive compensation from the Government. If this view is not correct—if the court holds it to be incumbent on appellant to establish the fact of this understanding and expectation of the committee—the court will be requested to remand the case with directions to the Court of Claims to make an explicit finding, from evidence already in the record, on this point. A motion, relating to this and other omissions in the findings, will be filed with the request that it be heard in connection with the appeal itself.

If the effects of the Haupt jetty can not be distinguished from those accomplished by the other works afterward constructed the Government is liable to appellant for these entire benefits.

The jetty completed under the Ripley contract and the Clark contracts mentioned in the findings (Rec., pp. 19, 20) was constructed absolutely upon appellant's design as originally reduced to details by him for use by the Aransas Pass Harbor Company; this jetty being on the north side of the channel. The works added later, consisting of a straight jetty to the south of the channel and a wall connecting the Haupt jetty with St. Joseph's Island, were upon the plans of the army engineers adopted by Congress in and after 1907. In so far as the scour between the jetties was effected by the north jetty, Mr. Haupt's design must be regarded as the dynamic agent in the development of the channel.

Assuming that the question of the adoption by Congress of appellant's patented design is jurisdictional, and

that the adverse judgment of the Court of Claims on this point is correct, any findings relative to the proved efficiency, and value, of that design would seem to be gratuitous; yet the court finds that, while a navigable channel was produced after the construction of the second jetty, roughly paralleling the other, it can not determine (Rec., p. 24) to its satisfaction whether the Haupt alone accomplished this result or whether, if left alone, it would have produced such a channel.

If any question of fact is capable of solution the Court of Claims can and does solve it. A mere "hung jury," the result of varying impressions made by evidence on different minds, is not possible in that forum. Its verdicts are made by a majority of five judges; and cases can be passed, or reheard, to obtain a full bench and break, or prevent a tie. The present finding, therefore, is to be taken as meaning that the confusion of fact is inherently of such sort that it could not be cleared by any proof whatsoever.

The law applicable to this state of things is clear.

In *Westinghouse Electric Co.* v. *Wagner Co.*, 225 U. S., 604, this court said:

> When a case of confusion does appear—when it is impossible to make a mathematical or approximate apportionment—then, from the very necessity of the case, one party or the other must secure the entire fund, it must be kept by the infringer or it must be awarded by law to the patentee. On established principles of equity, and on the plainest principles of justice, the guilty trustee can not take advantage of his own wrong. The fact that he may lose something of his own is a misfortune which he has brought upon himself. * * * He can not appeal to a court of conscience to cast the loss upon an innocent patentee. * * *

This decision invokes the rule declared by Chancellor Kent in *Hart v. Ten Eyck*, 2 Johnson, Ch. 62, and since

applied in various patent or copyright cases, that "all the inconveniences of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property or lose it." Among those cases are:

Callaghan v. *Myers*, 128 U. S., 617 (666).
Providence Rubber Co. v. *Goodyear, Extr.*, 9 Wall., 788 (802, 803).

The Court of Claims does not say that the value to the United States of the creation of a channel by the aggregate project in which the Haupt jetty was incorporated—by which that jetty was overlaid and its workings obscured—can not be determined; and it is submitted that a distinct finding should be made by that court on this point (if the present findings do not afford a basis for a conclusion of law and judgment) and the entire amount so found should be awarded to appellant.

In one particular, comparatively small as regards the moneys involved, the separate achievements of the Haupt jetty can readily be determined. While this jetty alone was operating, that is until the added construction of 1907 and later years began to show its effect, the continuous scour of the channel was accomplished without artificial dredging—precisely that thing occurred which the curved jetty was designed to accomplish. The twin-jetty plan, like all others of that class, presupposed artificial dredging, and the plans of 1907 and 1910 included appropriations for that particular purpose. But it was not necessary to use these appropriations—the expected dredging was not needed—until in 1912, when the south jetty was approaching completion. The saving of the dredging which the engineers had expected to do, and the expense thereof, is to be assigned to the Haupt jetty alone. This fortunate condition continued so long as there was no substantial interference with the operation of

that structure; it terminated when the superadded works became a serious factor.

Although the Court of Claims has found (Rec., p. 23) that "dredging was necessarily done in the years 1912 and 1915, inclusive, to maintain a navigable depth of channel in the pass," the record is not as full and clear, regarding the previous omission of the dredging, and the cause thereof, as could be desired. This is one of the subjects to be presented in the motion for a remand.

BENJ. CARTER,
Attorney for Claimant.

GEORGE RAMSEY,
Of Counsel.

CONTENTS.

ILLUSTRATIONS.

STATUTES CITED.

AUTHORITIES CITED.

In the Supreme Court of the United States

OCTOBER TERM, 1919.

LEWIS M. HAUPT, APPELLANT,
v.
THE UNITED STATES.
No. 336.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is before this court on appeal from the judgment of the Court of Claims dismissing appellant's (who will hereinafter be called claimant) claim for compensation alleged to be due under an alleged contract between claimant and the United States for the use of a patented invention involving a jetty or breakwater. The events which led up to the filing of the claim were, briefly, as follows:

Congress enfranchised a Texas corporation, known as the Aransas Pass Harbor Company, to develop Aransas Pass Harbor into a commercial port, Aransas Pass at that time being a nonnavigable inlet connecting the Gulf of Mexico with Aransas Bay and the Bay of Corpus Christi. Lewis M. Haupt, the claimant,

having obtained a patent purporting to cover a jetty or breakwater gave to the Aransas Pass Harbor Company a free license to use his patented construction in the development of the channel through Aransas Pass. This company built part of a jetty at Aransas Pass but failed to fulfill the requirements of the statutes enfranchising it and in compliance with the terms of these statutes conveyed to the United States all of its rights in the harbor at Aransas Pass, together with the jetty which it had partly constructed. Thereafter Congress by a series of acts appropriated money for the completion of the work begun by the Aransas Pass Harbor Company. Work was carried on under these acts until the project was completed, after which claimant filed the present suit against the Government to recover compensation for the use of his patented invention, alleging that his invention was used by the United States in the completion of the improvements at Aransas Pass, and also the existence of a contract between claimant and the United States for the payment of compensation for such use.

The acts complained of all occurred before June 25, 1910, so that the statute of that date (36 Stats., chap. 423, p. 851) giving patentees the right to sue the United States for the infringement of their patents is not involved, the action being brought entirely under the Tucker Act (24 Stat. L., chap. 359, p. 505).

The case was twice presented to the Court of Claims; first, at final hearing, after testimony had been taken by both parties to the suit, and again,

after the court had rendered its decision, on claimant's motion for a new trial.

Upon the first presentation of the case, the court understood claimant to contend that an express contract existed between the claimant and the United States, and finding that no such contract did in fact exist decided the case against claimant.

Claimant in his motion for a new trial contended that he was entitled to a decision as to whether or not there was a contract either express *or implied.* The court therefore considered both contentions and decided, as before, that there was no express contract, and also that under the circumstances no contract could be implied and dismissed the case for want of jurisdiction.

CONTENTION OF PARTIES.

Claimant alleges the existence of a contract, express or implied, by which the United States agreed to pay reasonable compensation for the use of claimant's patented invention.

Defendant contends that there was no such contract and that, therefore, the Court of Claims properly dismissed the suit for want of jurisdiction.

Defendant bases its contention upon the facts that in claimant's representations to the committees of Congress which were considering the improvement of Aransas Pass, and the subsequent expressions of Congress in the statutes authorizing the improvements at Aransas Pass, the *express* contract must be found, if at all, and that it is impossible to

find a contract in either of these and the further fact that it is impossible to find the prerequisites of an implied contract, namely:

(1) That the United States recognized the title to the patent in the claimant; and

(2) That the invention was used under such circumstances as to indicate that the United States intended to pay for such use.

(*United States* v. *Société Anonyme*, 224 U. S., 320; *Berdan Firearms Company* v. *United States*, 156 U. S., 552.)

SUMMARY OF FINDINGS.

The findings of fact are quite voluminous and, therefore, it is thought advisable to give a brief résumé of the same

The Court of Claims found that as early as 1869 attempts were made to create a navigable channel in the Aranas Pass inlet. In 1885 the Federal Government attempted to create a channel which involved the building of a jetty which became known as the "Mansfield Jetty." This attempt was unsuccessful, and in 1888 a considerable portion of that jetty had disappeared. Prior to 1889 work was continued by the Government on a "two-jetty" plan to the extent that the remaining portion of the Mansfield Jetty was extended, but this work was discontinued upon the recommendation of a special board which considered the subject of Texas inlets and recommended the suspension of all projects for improvement of harbors on the Texas coast, except that of Galveston.

On March 22, 1890, the State of Texas chartered the Aransas Pass Harbor Company as a private corporation "to engage in a work of great public importance," namely, the improvement of Aransas Pass. By the act passed May 12, 1890 (26 Stats., Chap. 201, p. 105)*, Congress granted to the Aransas Pass Harbor Co.,

*(26 Stats., Chapter 201, p. 105.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Aransas Pass Harbor Company, a corporation duly chartered under the laws of the State of Texas, and their associates, assigns, successors, and representatives be, and they are hereby, authorized on the conditions hereinafter mentioned, to construct, own, and operate such permanent and sufficient jetties and breakwaters and such auxiliary works as are necessary to create and permanently maintain, as hereinafter set forth, a navigable channel across the outer bar, which obstructs the entrance to Aransas Pass Harbor, on the coast of the Gulf of Mexico, in the State of Texas, and so far into the bays and navigable waters as may be necessary to reach a place that will afford ample dockage and protection from storms, swells, cyclones, and tidal waves for the purpose of furnishing the vessels and boats adapted to the purpose, facilities for navigation in and along the entire length of said channel and for that purpose they may construct in the Gulf of Mexico and in and across the bays and navigable waters adjacent thereto such walls, jetties, dikes, levees, and other structures, and employ such boats, rafts, bridges, and appliances, as they may in the prosecution of said work deem necessary: *Provided*, That no such structure or means employed shall hinder, delay, or interfere with the free navigation in said channel, harbor, bays, or navigable waters; and to protect their said works they may build and maintain such levees, embankments, walls, or riprap as may be necessary to secure their permanency along the banks or shores of Mustang, Saint Joseph, and Harbor Islands as the United States is authorized to grant, and to utilize such works as the Government has already constructed, and will hold the United States harmless from any damage that may accrue to any person or persons by the construction of said walls, jetties, dikes, levees, and other works constructed thereunder: *Provided further*, That unless the construction of the proposed work shall be commenced within one year from date of the approval of this act and be diligently prosecuted by the expenditure of at least three hundred thousand dollars per annum thereafter in the prosecution thereof until twenty feet depth of water over the outer bar is obtained, the grant of privileges herein shall be forfeited; and unless the said company, their associates, assigns, successors, or legal representatives shall secure a navigable depth over said outer bar of fifteen feet of water within thre years after the date of the approval of this act, and a navigable depth of twenty feet of water over said bar within five years from said date, then

its assigns, successors, etc., a franchise to open Aransas Pass, providing that the work thereon should be commenced within one year of the passage of the act and that at least $300,000 per annum should be expended upon said improvement until a channel 20 feet deep should have been obtained. Congress further provided, in this statute, that should the company fail to meet these conditions all privileges granted by the act should be forfeited (thereby reverting to the United States) and that at any time after the completion of the improvements the United States should have the right to pay the company the value of the improvements, and upon such payment to obtain all rights in the work done by the company

This company, in March of 1892, began work upon a jetty known as the "Nelson Jetty," but abandoned this work in August of 1893, and this jetty was later destroyed by the waves. The Aransas Pass Harbor Company failed to meet the conditions imposed in the hereinbefore referred to act of May 12,

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Congress may revoke the privileges herein granted in relation to said improvements.

SEC. 2. That at any time after said improvements and auxiliary works have been completed as herein provided, and said depth of twenty feet has been obtained, the United States shall have the right to pay the said company, or their assigns, successors, or legal representatives, the value of the works constructed under this act or under or by virtue of any authority granted by the State of Texas, and on such payment being made by the United States all rights to said work on the part of said parties shall cease, but nothing in this act shall be construed as compelling the Government to take possession of and pay for said works unless so desired. Nothing within the provisions of this act shall be construed as authorizing the said company to charge or collect tolls or tonnage upon boats or vessels navigating said channel and the navigation of the same shall be free.

Approved, May 12, 1890.

1890 (26 Stat., p. 105), and Congress by act of January 22, 1894 (28 Stat., chap. 12, p. 26),* released the company from certain of the conditions of the prior act and granted to it the right to resume the work.

After the passage of this act of January 12, 1894 (second act), Haupt, the claimant, granted to the Aransas Pass Harbor Company, named in the act, the privilege of using his patented invention (a particular form of jetty) at Aransas Pass without the payment of compensation for such use, his motive being to have his jetty tested, since it never before had been reduced to actual practice.

Haupt prepared working drawings of a jetty and submitted them to the Aransas Pass Harbor Com-

*(28 Stats., chap. 12, p. 26.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Aransas Pass Harbor Company, which is engaged in the improvement of Aransas Pass under the provisions contained in an act of Congress entitled "An act for the improvement of Aransas Pass," approved May twelfth, eighteen hundred and ninety, is hereby relieved from the conditions of said act which require the construction of said work to be commenced within one year from the date of its approval and to be diligently prosecuted by the expenditure of at least three hundred thousand dollars per annum thereafter, and to secure a navigable depth over the outer bar of fifteen feet of water within three years after the date of approval of said act, and of twenty feet within five years from said date; and the said company is hereby authorized to continue and complete its work of improvement as set forth in said act: *Provided,* That work shall be resumed by the said Aransas Pass Harbor Company within six months from the date of approval of this act, and shall be diligently prosecuted to completion, and said company shall secure a navigable depth over the outer bar of at least twenty feet of water within two years from the date of approval of this act. And in the event of said company failing to resume said work within the said six months, or failing to diligently prosecute the same, or to secure a navigable depth of twenty feet of water over the outer bar within the time required by this act, then Congress may revoke the privileges herein granted in relation to said improvement.

Sec. 2. That the right of Congress to alter, amend, or repeal this act is hereby reserved.

Approved January 22, 1894.

174654—20——2

pany; but the company, realizing that the use was experimental (since the construction had never been tested) and because of its financial limitations, informed Haupt that it was unable to proceed on such an elaborate plan. Whereupon Haupt, at the request of the company, prepared modified plans which the Court of Claims found embodied about one half of his patented construction. These modified plans consisted of a so-called reverse or ogee curve jetty. The Aransas Pass Harbor Company proceeded to build according to these modified plans. Haupt was paid for preparing the plans and supervising the construction of the jetty, of which the company built only a single curve, i. e., one-half of the reverse curve. Work was continued by the company on this curved jetty and on the removal of the remaining portion of the Mansfield jetty until 1897.

On May 28, 1898, the Senate concurred in a resolution adopted by the House of Representatives on May 26, 1898,* authorizing the War Department to prepare and submit plans and estimates for the improvement of Aransas Pass Harbor and the deepening of the channel across the bar in Aransas Pass. The board created by the Secretary of War reported

* "That the Secretary of War be, and he is hereby, authorized and directed to prepare and submit plans, specifications, and estimates for the improvement of Aransas Pass Harbor, State of Texas, and especially to make plans and estimates for the removal of the sand bar at Aransas Pass and the deepening of the channel across said bar to a depth of at least twenty feet and a width of at least one hundred and fifty feet at the bottom, so as to furnish an inlet for the passage of vessels from the Gulf of Mexico into Aransas Harbor; and report such plans to Congress, and also whether in his judgment such improvement should be made."

to the effect that two jetties and dredging were necessary, *one of the jetties to be on the line of the jetty started by the Aransas Pass Harbor Company*, and the other to be spaced some 1,200 feet south of the same.

In the meantime Haupt had called the attention of members of Congress to his patented construction and when the report of the board was submitted to the House Committee on Rivers and Harbors, Haupt, as an engineer and contractor, was requested by the chairman of the committee to submit his proposition relative to making the improvements. His proposition did not meet with approval of the committee and they rejected it, whereupon Haupt informed the committee that if the Government used his invention he would expect compensation for such use.

By the Act of March 3, 1899 (30 Stats. Chap. 425, pp. 1121, 1128),* Congress authorized the Secretary of War to contract for the removal of the old Mansfield jetty provided that the work should not be done until the Aransas Pass Harbor Company transferred to the United States all of its rights and privileges in the harbor and the jetty constructed in said harbor under the supervision of Haupt. These rights were conveyed on March 27, 1899.

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* "*Provided*, That the Secretary of War is hereby authorized to contract for the removal of that portion of the old Government jetty in said harbor from the end nearest the curved jetty, constructed by the Aransas Pass Harbor Company, to the wreck *Mary*, in such manner as to in no wise interfere with the curved jetty now located in said harbor: *And provided further*, That said work shall not be let by the Secretary of War nor said work done until the said Aransas Pass Harbor Company shall have properly released and surrendered all rights and privileges heretofore granted to it in said harbor by Congress, also the jetty constructed in said harbor."

When Haupt got information that the Aransas Pass Harbor Company was going to transfer its rights to the United States he informed the company that it had no right to transfer the license which he had granted to it as it was a "personal license" and not assignable. He also informed the United States to this effect.

Subsequently Congress passed several acts (June 13, 1902, 32 Stats. 331, 340, Chap. 1079; March 3, 1905, 33 Stats. 1117, 1130, Chap. 1482; March 2, 1907, 34 Stats. 1073, 1091, Chap. 2509) authorizing the Secretary of War to continue the improvement of Aransas Pass "*in accordance with the design and specifications of the Aransass Pass Harbor Company and in continuation of the work heretofore done.*"

The United States, through contractors, removed the old Mansfield jetty and continued the jetty started by the Aransas Pass Harbor Company. Before the United States started work on this latter jetty, it submitted its plans (which were drawn by the Army engineers) to said Aransas Pass Harbor Company, and the plans were in turn submitted to the company's engineers, among whom was Haupt, who suggested modifications which were adopted by the United States bringing the plans in substantial accord with the modified plans adopted by the Aransas Pass Harbor Company, i. e., the plans which included only a portion of the patented jetty. The United States completed the jetty started by the company, and the Court of Claims found that this completed jetty was not built in accordance with, nor did it

embody, the features patented by claimant. Furthermore, it did not produce a navigable channel. Subsequently, a second jetty was built by the Government,* which jetty was substantially parallel to and 1,200 feet from the first jetty (in accordance with the "two jetty" plans submitted by the War Department), and by the aid of this jetty and successive dredgings Aransas Pass has now become navigable.

BRIEF OF ARGUMENT.

In the following argument defendant will show:

(1) That no contract to pay claimant compensation for the use of any design patented by him is expressed in the statutes authorizing the building of the jetty which is made the subject matter of this suit;

(2) That no such contract can be implied either from the statutes, the actions of the congressional committees, or the action of the United States in completing the jetty started by the Aransas Pass Harbor Company; and

(3) That the United States did not use any construction patented to claimant.

THERE WAS NO EXPRESS CONTRACT BETWEEN HAUPT AND THE UNITED STATES FOR THE USE OF HAUPT'S PATENTED CONSTRUCTION.

No express contract can be found in the statutes authorizing the continuation of the building of the jetty begun by the Aransas Pass Harbor Company by the United States, for when Congress authorized the continuation of the building of this jetty in ac-

cordance with the plans and specifications adopted by the Aransas Pass Harbor Company it did not authorize the use of Haupt's patented invention, inasmuch as *the plans adopted by said company were not in accordance with the patented invention.*

When the Government was considering the continuation of the building of the jetty started by the Aransas Pass Harbor Company, claimant appeared before the Senate and the House committees, having the work in charge, and offered to complete the work on the harbor for a stipulated sum (which he stated would include no royalty for the use of his patented invention if it were used), and informed the committees that if the contract for the completion of the work were not given to him and his patented invention were used by the Government he would expect compensation for such use (Record, p. 19, finding IX). The committees rejected his offer to complete the work and did not signify their intention to use his patented invention.

The first question before this court is whether or not, if claimant's statements to the committees that he expected compensation for the use of his patented invention if the Government used the same be considered an offer to permit its use, the subsequently enacted statutes constituted an express acceptance of that offer.

Claimant contends that when Congress authorized the continuation of the building of the jetty in accordance with the "design and specifications of the Aransas Pass Harbor Company, and in con-

(No Model.) 3 Sheets—Sheet 3.

L. M. HAUPT.

DIKE OR BREAKWATER.

No. 380,509. Patented Apr. 3, 1888.

FIG. II.

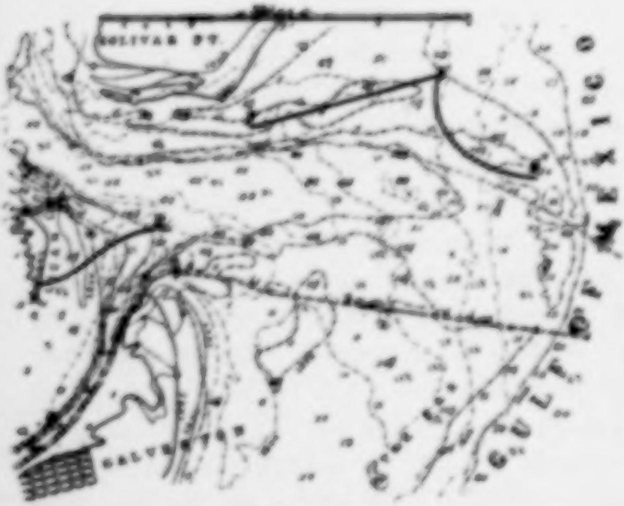


FIG. III.

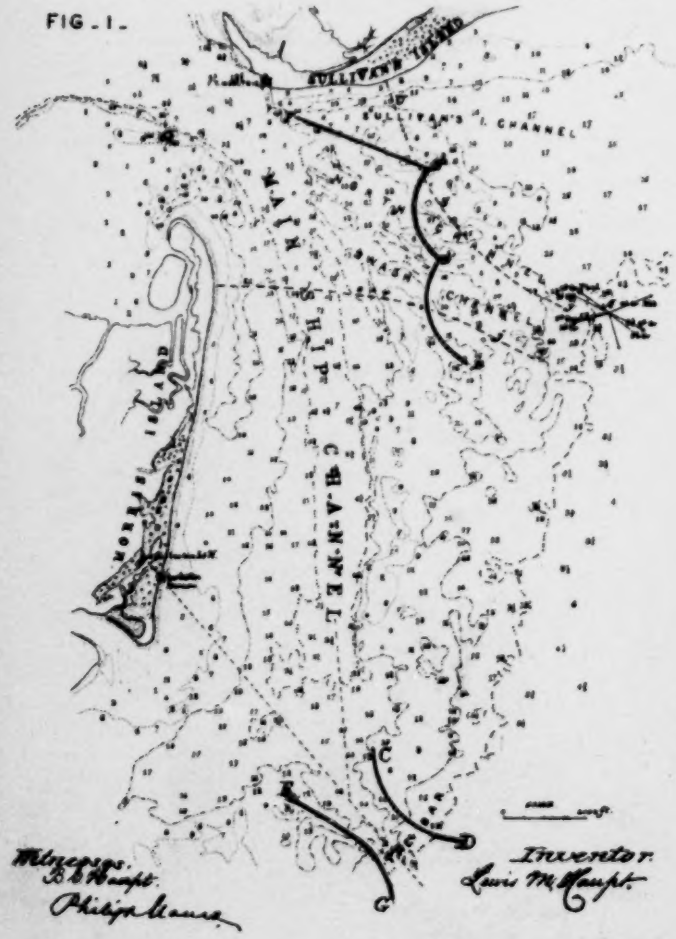
(No Model.) 2 Sheets—Sheet 1.

L. M. HAUPT.

DIKE OR BREAKWATER.

No. 380,569. Patented Apr. 3, 1888.

FIG. 1.



tinuation of the work heretofore done" it accepted his offer to permit the use of his patented invention, and thereby contracted with him for the payment of reasonable compensation for such use.

This, however, is not a fair inference, as the plans adopted by the Aransas Pass Harbor Company were not in accordance with claimant's patented invention, and the Court of Claims so found, the finding being to the effect that the modified plans embodied about one-half of the patented invention (Record, page 25). Examination of the drawings, which are part of Haupt's patent and which are reproduced opposite page 13, will suffice to show the radical differences between the patented construction and that built according to the plans of the Aransas Pass Harbor Company (for which plans see cut opposite page 14). The form of the jetty shown in figure 1 of the patent drawings is utterly dissimilar to the Aransas Pass Harbor Company plans, as this form of the construction, which is shown at the upper portion of the drawing, immediately below "Sullivans Island," is made up essentially of two intersecting arcs and an inshore flank running in converging relation with the shore of Sullivans Island, but the end of which is spaced from the island, leaving an opening through which the tide is intended to flow to the inner basin. The jetty started by the Aransas Pass Harbor Company, in accordance with the modified plans which were drawn for the company by Haupt, included a single compound or S curve (as contradistinguished from two intersecting curves

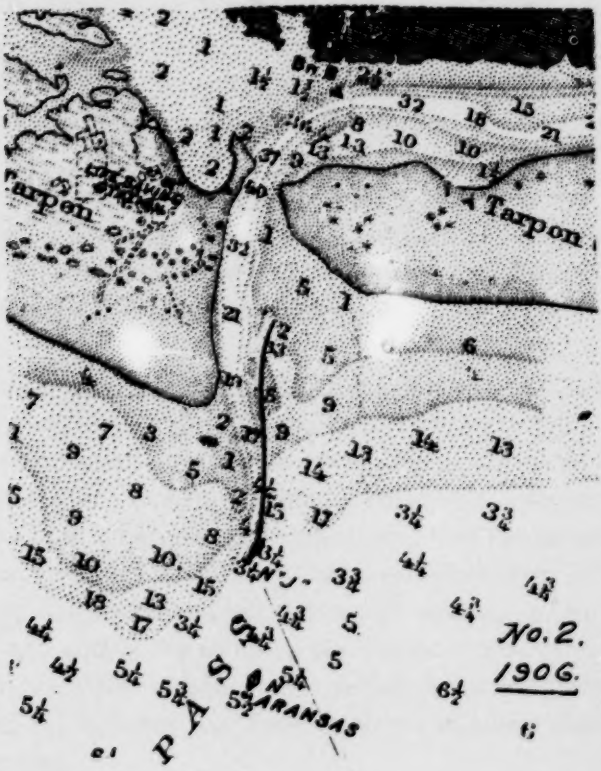
as called for in the patent) and no flank at the inshore end.

At the lower end of figure 1 of the Haupt patent drawing two spaced curves are shown, one being a simple curve and the other a compound one, their purpose being to cooperate with the main jetty (shown at the upper part of the drawing) extended from Sullivans Island "whereby the tidal currents are compressed and increased in velocity over the crest of the bar." These are supplemental constructions adapted to cooperate with the jetty shown at the upper end of this figure 1.

In figure 2 of the patent drawing the construction shown in figure 1 is modified by the omission of one of the intersecting arcs, leaving but a single curve and the inshore flank, which extends in substantially the same relation to Bolliver Point, shown at the upper end of this figure 2, as the inshore flank of figure 1 does to Sullivans Island. At the left side of this figure there is also shown what Haupt refers to in his patent specification as the dyke RD, which dyke extends from Pelican Island, being joined thereto and "cooperating with the breakwater by conserving the energy of the inner force for ebb effects."

Figure 3 illustrates a reverse curve jetty, but this is supposed to be used under different conditions than those encountered at Aransas Pass or in any harbor constructions. Haupt says of this construction that "in tidal rivers the form would be a reverse curve or ogee placed upon or near to the bar across which a channel is desired." (Record, p. 33), and in the

THE RED LINE REPRESENTS THE JETTY BUILT IN ACCORDANCE WITH THE MODIFIED PLANS ADOPTED BY THE ARANSAS PASS HARBOR COMPANY AND BUILT BY THE COMPANY AND THE UNITED STATES WHICH JETTY INCLUDED ABOUT ONE HALF OF HAUPT'S PATENTED JETTY. (SEE FINDINGS V AND XV).



specific description of figure 3 says that it represents a plan of reaction dyke which might be useful in the Delaware River. Distinguishing this reverse curve construction which he proposed to use in tidal rivers from those which he proposed to use in harbors, he says: "In harbors, the proper form of breakwater to secure these desiderata is one composed of a series of intersecting arcs, having their cusps or salients so placed as to cut the advancing waves and resolve them into components along the concave faces of the structure, which is intended to extend above high water." (Record, p. 32.) This construction he clearly illustrates in figure 1 of his patent drawings, where the arcs both face in the same direction, so that the "salients are placed to cut the advancing waves and resolve them into components along the concave faces of the structure."

A comparison of the patent drawings with the jetty built according to the Aransas Pass Harbor Company plans discloses the fact that the patent did not contemplate the use of a compound curve in a jetty or breakwater in harbor construction, and that the plans of the Aransas Pass Harbor Company, since they included only a compound curve and nothing more, were not within the scope of the patent. The prior art shows many reverse curve jetties similar to that begun by the Aransas Pass Harbor Company (see appendix).

Therefore when Congress, in its several appropriation acts authorized the continuation of the work

begun by the Aransas Pass Harbor Company "in accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore done," it clearly did not authorize the use of any design patented to claimant and the language of the statutes can not be construed to constitute an acceptance of claimant's offer to permit the use of the patented invention.

The statutes do not specifically authorize the use of Haupt's patented invention, either by referring to Haupt or to his patented construction, and for the reasons above set forth the language of the statutes can not be construed to constitute an adoption of his invention, especially in the face of the fact that neither Haupt nor his invention were mentioned in the statutes even though Haupt was before the congressional committees during the framing of the statutes.

EVEN IF THE PLANS ADOPTED BY THE ARANSAS PASS HARBOR COMPANY WERE IN ACCORDANCE WITH CLAIMANT'S PATENT (WHICH DEFENDANT DENIES), STILL THE STATUTES DO NOT CONSTITUTE AN ACCEPTANCE OF THE OFFER.

But even if the plans under which the Aransas Pass Harbor Company were operating were in accordance with the jetty patented to claimant (which defendant denies), still the statutes can not be construed as an acceptance of his offer and a promise to pay compensation for the use of his patented invention, if his statement hereinbefore quoted be construed as an offer. It is clear that Congress had

no intention to accept claimant's offer, for if it had such intention there is no reason why it should not have authorized the continuance of the building of the jetty by defendant in accordance with the plan patented to him, or, in other words, make a direct statement indicating its adoption of his patent, especially as he had already acquainted Congress with his patent. If Congress was apprehensive (as contended by claimant in his brief) that the Army Engineers would not continue the building of the jetty according to structural specifications as to measurements, degrees of curvature, etc., of the company, it could have provided, by a simple statement, for the adoption of claimant's patented design, and directed that it be built in accordance with the structural specifications of the Aransas Pass Harbor Company.

It is equally clear that Congress meant what it said in the statutes, i. e., to authorize the continuation of the building of the jetty started by the Aransas Pass Harbor Company and not to authorize the use of Haupt's invention. Behind these statutes was an obvious desire, on the part of Congress, to avail itself of the privilege reserved to the United States in the statutes enfranchising the Aransas Pass Harbor Company *; that is, the privilege of acquiring all rights that said company had in the jetty, which privilege was reserved before claimant became identified with the Aransas Pass Harbor Company or before he offered his patent to it.

* See footnote, page 5, for text.

Claimant was totally ignored in the statutes; his name was never mentioned; his patented invention was never mentioned. It is difficult to perceive, that if Congress had intended to adopt claimant's patented invention and to compensate him therefor, it would not have said so in the statutes when it is considered that Congress ultimately would have to appropriate the money for such compensation to satisfy the judgment of the Court of Claims or this honorable Court. Neither is it conceivable that Congress would have left to judicial determination whether or not it intended to and did make a contract with claimant when it had all the facts, as well as claimant and his patent before it at the time the statutes were enacted and could have, by a simple statement, made clear its intention to contract.

It may be argued that Congress was not in a position at that time to fix compensation, but that is no reason why it could not have made clear its intention to contract, since the question of compensation could have been left to a designated body (as is often done). The mere fact that Congress did not mention compensation conclusively shows that it did not intend to contract for the payment of any.

Defendant's contention that Congress did not intend to contract with claimant for the use of this patented invention, is reinforced by the fact that the Senate on May 28, 1898, before the passage of any act authorizing the building of the jetty by defendant, concurred in the resolution adopted by the

House May 26, 1898,* authorizing the Secretary of War to investigate the improvement of Aransas Pass and to report a plan therefor. This investigation was made and the Army Engineers reported that it was desirable to build on a "two-jetty plan," one of the jetties to be on substantially the location of that portion of the jetty built by the Aransas Pass Harbor Company and the other to be spaced some twelve hundred feet from it. In the light of this recommendation it was perfectly natural for Congress later to authorize the continuation of the work started by the Aransas Pass Harbor Company, for otherwise to improve the harbor according to the plan submitted by the Army Engineers would have necessitated the removal of that portion of the jetty which was built by the Aransas Pass Harbor Company and the building up of another jetty on substantially the same location. This was especially logical, since defendant had acquired all rights in the incomplete portion of the jetty. To do otherwise than to use the already built portion of the jetty would have been a useless waste of money, and since the project was exceedingly expensive and of great public importance, it was natural for Congress to avail itself of the privileges which it had reserved to the United States in the enfranchising of the Aransas Pass Harbor Company and continue the building of the jetty started by said company.

Therefore, even if the jetty begun by the Aransas Pass Harbor Company had been built in accordance

* See footnote, p. 8, for text.

with claimant's patent (which it was not), there was no expression of intention by Congress to use his invention, but only an expression of a desire to avail itself of the work which had been done by the Aransas Pass Harbor Company without regard to any rights which claimant might have had or claimed.

The language of the statutes is not open to doubt and is particularly free from ambiguity. There is no expression of an intention to contract, and the acts of Congress which have been held to constitute contracts with private parties consistently contain contractual language.

THAT CONGRESS DID NOT INTEND TO CONTRACT WITH HAUPT IS FURTHER EVIDENCED BY THE FACT THAT THE GOVERNMENT, WHEN IT TOOK OVER THE WORK OF THE ARANSAS PASS HARBOR COMPANY, ALREADY HAD A FREE LICENSE TO USE THE HAUPT INVENTION IF IT SO DESIRED IN THE CONSTRUCTION OF THE JETTY STARTED BY THE COMPANY.

When the Aransas Pass Harbor Company began to build the jetty which claimant claims to have been built in accordance with his patent, claimant granted to said company the free right to use his patented device in the building of that jetty, it being his desire and to his advantage to have an early demonstration of said device. (Rec., pp. 14 and 15, Finding V.)

When this free license was granted to the Aransas Pass Harbor Company, it appears that claimant had actual notice of the act of May 12, 1890 (26 Stat., chap. 201, 105),* enfranchising the Aransas Pass Harbor Company and the act of January 22, 1894* (28 Stat.

*See footnote, pp. 5, 7, for text.

26), extending its franchise. Even if he did not have actual notice he at least had constructive notice of the acts. In the former act the Aransas Pass Harbor Company and their associates, assigns, successors, and representatives, were authorized to construct jetties, breakwaters, and auxiliary works therefor to obtain a channel through Aransas Pass. It was provided in this act that the United States should have the right to take over such jetties, breakwaters, and auxiliary works after their completion upon the payment of the cost of the same. The act contemplated the completion of the jetty either by the Aransas Pass Harbor Company, or its assigns or successors, so that when claimant granted a free license to the Aransas Pass Harbor Company, he necessarily at the same time included the assigns and successors of said company in the license. The law being in existence at the time of the granting of the free license was as much a part of the license as if it had been written in the license itself (9 Cyc. p. 582, Chap. VIII, par. C–3, and authorities cited; 11 Cent. Digest, par. 750, and authorities cited), and if it were written in the license that the license was granted to the Aransas Pass Harbor Company, its assigns or successors, it is clear that the free license would have passed to the assigns or successors upon the transfer of the jetty to of the jetty to them (*Brush El. Co.* v. *California*, etc., 52 Fed. Rep. 945, 959, C. C. A.). Therefore, when, on March 27, 1899, the Aransas Pass Harbor Company conveyed, released, and surrendered unto the United States all of its rights in the jetty constructed in

said harbor, it conveyed with it the free right to use claimant's patented device (irrespective of whether or not it had actually used the device or, in other words, availed itself of the free license).

Claimant now contends that the United States agreed to pay to him certain compensation in consideration of his granting to the United States the right to use his patented invention in the construction of the jetty which was begun by the Aransas Pass Harbor Company and which was completed by the United States, but as the United States, as successor to the Aransas Pass Harbor Company, already had the irrevocable right to use his invention if it saw fit, the consideration flowing from him would have been a past consideration, which, as a matter of law, is no consideration at all. (Page on Contracts, par. 319, p. 480, and authorities cited; Clark on Contracts, p. 197, and authorities cited.) As there was no possibility of consideration flowing from claimant to defendant there could have been no contract, so that it is unnecessary to examine the several acts of Congress to see whether or not a contract could be implied therefrom, for even if, in those statutes, Congress had attempted to make an express contract, it would have been void for want of consideration.

If Congress had, in express language in the statutes authorizing the continuation of the building of the Aransas Pass Jetty, agreed to pay compensation to Haupt for the privilege of using his patented construction, there would still have been no contract, as

the consideration flowing from Haupt to the United States would, as above stated, have been a past consideration. The promise by Congress to pay under these circumstances would have been a mere gratuity and Haupt's relief would lie, not through the Court of Claims, since there would have been no contract, but by direct appeal to Congress itself.

Furthermore when claimant gave the license to the Aransas Pass Harbor Company he knew or it is presumed that he knew that the Government contemplated taking the work over either before or after it was finished since the statute enfranchising the company reserved to the Government such right in that jetty. Therefore, on the broad ground of public policy the license should be construed as extending to the free use of the patented invention by the Government in the completion and operation of the particular jetty. It would be against public policy to lay low the bars of conspiracy and fraud to hold that the license did not pass to the Government by operation of law, since it would permit parties in the position of claimant and the Aransas Pass Harbor Company, if so disposed, through an agreement between them, and by a partial construction of an improvement, which might practically preclude any other form of improvement, so to involve the Government as to compel it, upon the failure of the company, to pay a royalty to the patentee for the completion and use of the improvement; and especially would it be against public policy in view of the provision of the

statute in question which contemplated the use or the completion and use by the Government of the Aransas Pass Harbor Company's work.

For instance, the Aransas Pass Harbor Company might have constructed and completed the improvement with the exception of a small gap of but a few feet and then failed in its completion for one reason or another, and if the license be held not to pass to the Government, it would have no right either to use or to complete and use the work constructed by the company.

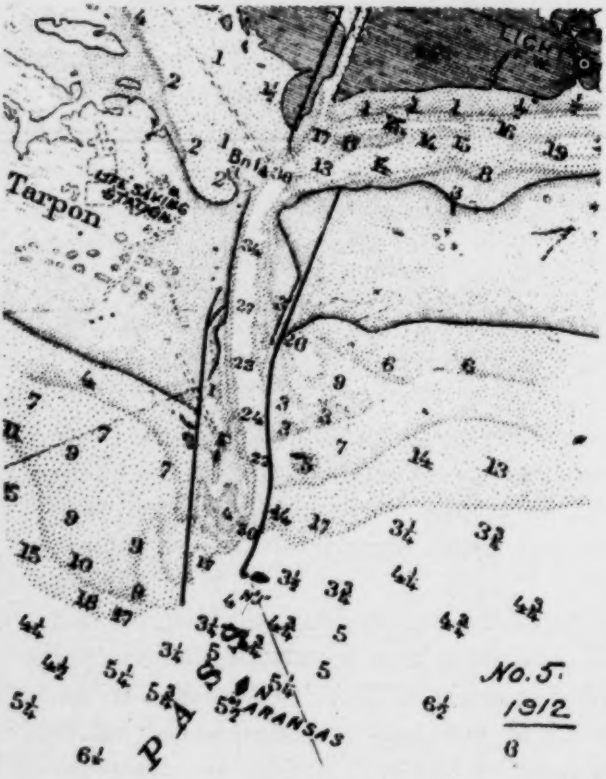
Page on Contracts, section 1120, states—

> If the interest of the public is affected by a contract, it should be construed so as to protect such interest.

Most assuredly the interest of the public demands a construction of the license to the Aransas Pass Harbor Company holding it to carry with it a right to assign to the Government when the work is taken over by it.

For the two very good reasons advanced above, which are independent of each other and each of which is sufficient in itself to warrant a holding that the license passed by operation of law to the Government, we submit that the granting of the license to the Aransas Pass Harbor Company of the right to construct and use claimant's device carried with it right to assign the license to the Government or the right to the completion and use of the device by the Government without compensation to claimant.

THE RED LINES REPRESENT THE TWO JETTIES FINALLY COMPLETED BY THE UNITED STATES AT ARANSAS PASS.



EVEN IF THE ACTS OF CONGRESS CONSTITUTE A CONTRACT NO MONEY IS DUE HAUPT, AS HIS PATENTED INVENTION WAS NEVER USED.

Assuming *arguendo* (but not admitting it to be a fact) that Congress in the several acts appropriating money for the completion of the work at Aransas Pass authorized the use of Haupt's patented invention, the contract could only be that the United States would compensate Haupt in the event that his patented invention was actually used.

The Court of Claims has found that the jetty begun by the Aransas Pass Harbor Company and completed by the United States was in accordance with the modified plan and specifications furnished said company by the claimant (Finding XV, p. 21, Rec.), and further that the jetty so constructed did not embody any of the devices of the claimant's letters patent No. 380569, the patent in suit. (Finding XV, p. 22, Rec.)

That the finding of the Court of Claims as to the nonuse of claimant's patented construction by the United States is entirely correct, is evident upon a consideration of Haupt's patent (drawing opposite, page 13) in conjunction with the drawing of what the Government actually built (see drawing opposite page 25). The Haupt construction included, as has hereinbefore been pointed out, in harbor constructions, intersecting arcs with their cusps or salients so placed as to cut the advancing waves and resolve them into components along the concave faces of the structure. The patented structure also included a

flank which extended at an angle to the general direction of the jetty and converged with the shore, terminating, however, in spaced relation to the shore so as to permit the inflow of the tide to the inner basin. The patent does not contemplate the attachment of the jetty to the shore by any means whatsoever. The curved jetty built by the Government consisted, not of intersecting arcs with an attached flank as in the patent, but of a compound or ogee curve, the inner end of which was attached to the shore by a straight portion, thus eliminating the possibility of any inflow of the tide into the inner basin between the inner end of the jetty and the shore. Thus the Government-built jetty not only did not include the intersecting arcs with their resulting salients and their concave faces along which the waves passed after being resolved into their components by the salients, but it omitted, also, the flank and was attached to the shore to destroy the possibility of any inflow of the tide. A cursory examination of the drawing of the Government-built jetty establishes these facts beyond peradventure. Furthermore, this jetty, so built, failed to produce a navigable channel, so that it was necessary to build a second jetty spaced from the first built jetty and substantially parallel to its general direction. It was also necessary to dredge between these two jetties before a navigable channel was finally produced.

Claimant assumes a rather anomalous position in that he complains of the use of his patented invention

by the United States and for that use he alleges that $1,250,000 is due him as reasonable compensation. In the very next breath he complains (Rec., p. 7, XIV) of the action of the Government in combining with the curved jetty at Aransas Pass a straight jetty spaced therefrom, for the reason that this straight jetty destroyed the possibility of any successful operation of the curved jetty in accordance with the theory of his patent, and therefore that he has been damaged to the extent of $500,000. This is an absolute acknowledgment on the part of the claimant that his invention was not used, so that he is not entitled to any compensation whatsoever, even if there had been a contract such as he alleges.

DISCUSSION OF CLAIMANT'S BRIEF.

It is incumbent upon defendant to discuss claimant's brief only because of the numerous and manifest inaccuracies (doubtless inadvertent, to use claimant's expression) therein.

Claimant states (Brief p. 3, lines 19–29), in effect, that the officers of the Aransas Pass Harbor Company were impressed with appellant's patent; that he "put it (Haupt's patented design—our insert) on paper for them in the form of a reverse curve"; that he offered the free use of his plan to the company; and that the offer was accepted. The Court of Claims found as a fact that the plan adopted by the company was not in accordance with claimant's patent (Finding XV, Rec. pp. 14–15) and that the jetty as completed by the Government, defendant,

"did not embody any of the devices of plaintiff's said Letters Patent No. 380,569." It will be seen that claimant's statement is misleading.

Then, again, the matter beginning with "Mr. Haupt" (l. 3, p. 4) and ending with "the engineers" (l. 22, p. 4) is not based on the facts found by the Court of Claims.

There is no basis in the findings for the statement made in the first twenty lines of the paragraph beginning on page 6.

The matter in the paragraph beginning in line 6 on page 7 is indicative of the general inaccuracy of claimant's brief. Claimant states that in 1906 the depth of the channel *available for navigation* was over 16 feet. The finding is contrary (Finding XVIII, Rec. p. 23). The finding is to the effect that in 1906 the depth of the channel was varying, sometimes being as deep as 20 feet but *too narrow for regular* navigation, and that in 1908 the ruling depth was *6 feet.*

In the second assignment of error (p. 8) claimant states "that Congress, in enjoining the War Department to apply appellant's design in the continued improvement of Aransas Pass Harbor * * *." This is a bald misstatement of the holding of the court, for the court distinctly held that Congress did not adopt any plan patented by appellant. (Rec. p. 22, Finding XV.)

The sentence beginning in the last line of page 18 and ending on page 19 is not based on the findings of fact.

CONCLUSION.

It is submitted that defendant has shown that in the acts of Congress authorizing the continuation of the work started by the Aransas Pass Harbor Company at Aransas Pass, Texas, no contract to pay for the use of any invention patented to Haupt, the claimant, can be found in express language or in such language as to justify the implication of a contract; that no contract can be implied under the line of decisions of which *Berdan Firearms Company* v. *United States*, 156 U. S. 552, and *United States* v. *Société Anonyme*, 224 U. S. 320, are representative, inasmuch as under these decisions to imply a contract to pay compensation for a patented invention, it must be found that the Government acknowledges title to the patent in the claimant, and that it uses the patented invention under such circumstances as to indicate its intentions to pay for such use; and that the invention disclosed in Haupt's patent was not used by the Government, nor did any branch of the Government ever express its intention to use the invention of the patent.

It is respectfully urged that the judgment of the Court of Claims dismissing for want of jurisdiction should be affirmed.

Respectfully submitted.

FRANK DAVIS, JR.,
Assistant Attorney General.

Edward G. Curtis, Daniel L, Morris, special assistants to the Attorney General.

APPENDIX.

REPRODUCTION OF EXHIBITS.

In this appendix the devices which were in existence before Haupt filed his application on which the patent in suit issued are illustrated, the location of the several jetties which include simple curves, reverse curves, and curves combined with straight portions, being shown.

THIS DRAWING REPRESENTS A PORTION OF THE COAST OF CALIFORNIA IN WILMINGTON HARBOR, CALIFORNIA, WHEREIN DEAD MAN ISLAND AND RATTLESNAKE ISLAND, WHICH HAS IT BEEN PROPOSED TO CONNECT BY A BREAKWATER, ARE SITUATED. SEE AT THE TIME OF THE FILING OF CLAIMANT'S PATENT APPLICATION. SEE SHEET 4. (SEE PERIOD 1871).

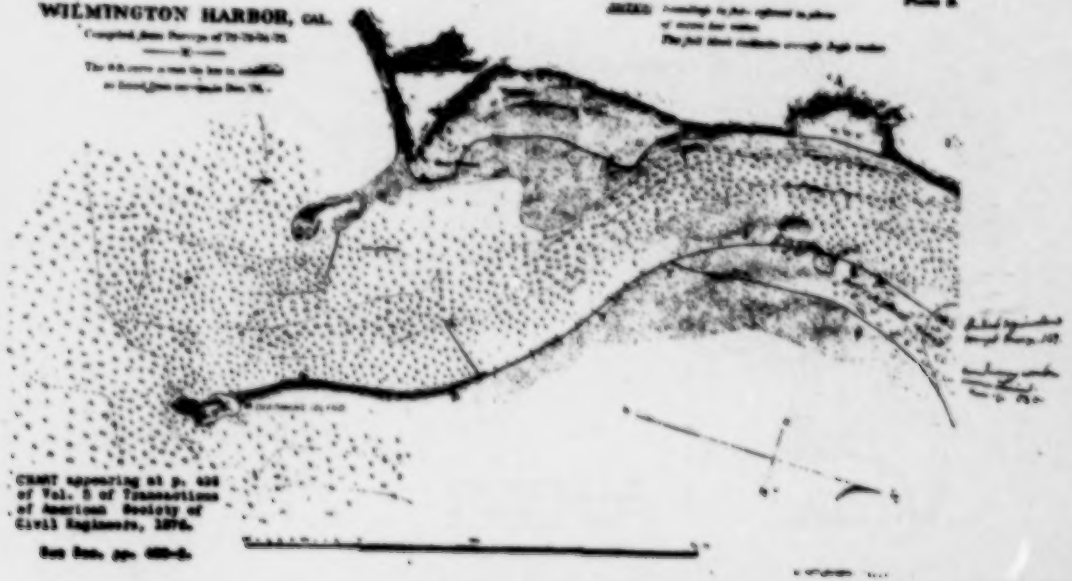
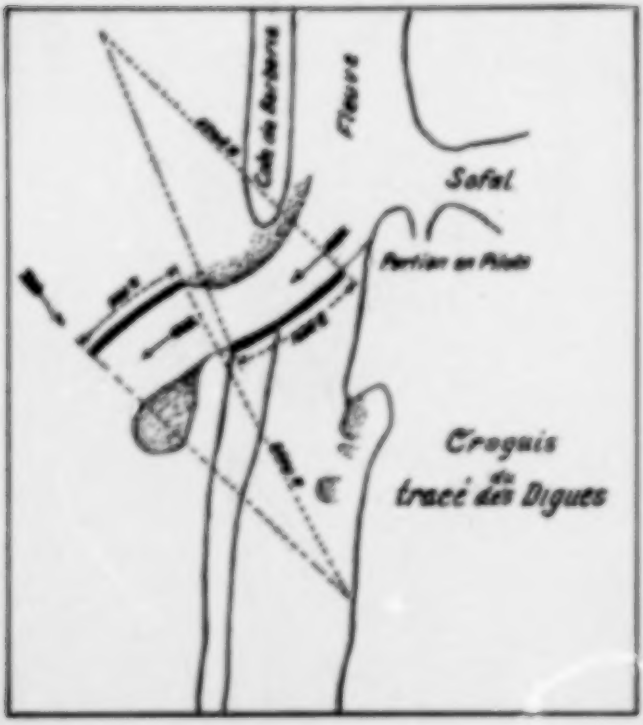


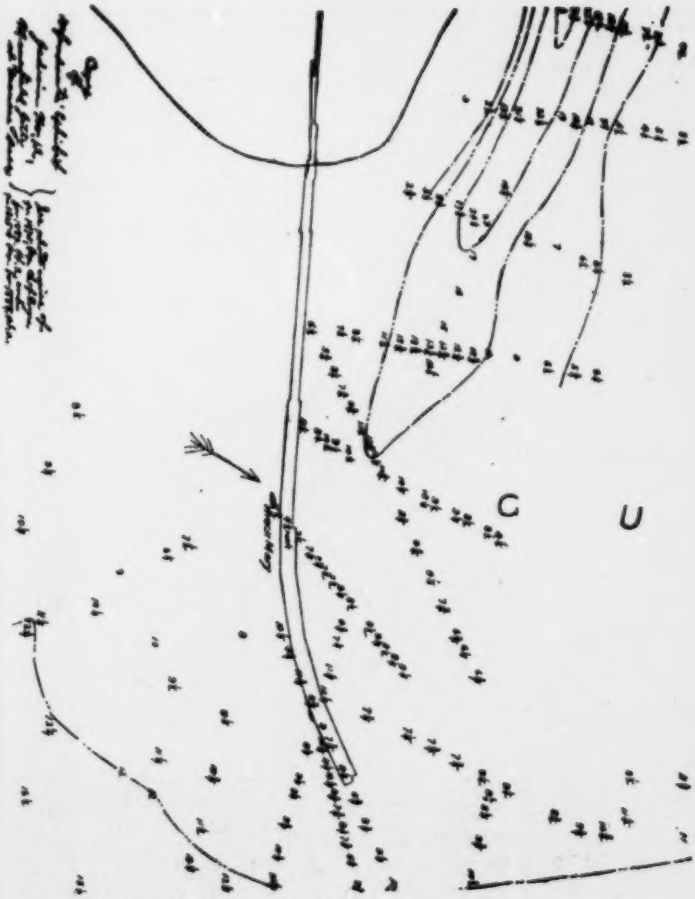
CHART appearing at p. 428 of Vol. 5 of Transactions of American Society of Civil Engineers, 1876.

THIS DRAWING REPRESENTS A REVERSE CURVE DIKE OF RECLAMATION IN WILMINGTON HARBOR, CALIFORNIA, BETWEEN DEAD MANS ISLAND AND RATTLE SNAKE ISLAND, WHICH WAS IN EXISTENCE AT THE TIME OF THE FILING OF CLAIMANT'S PATENT APPLICATION. EXHIBIT A. (SEE FINDING XVII).

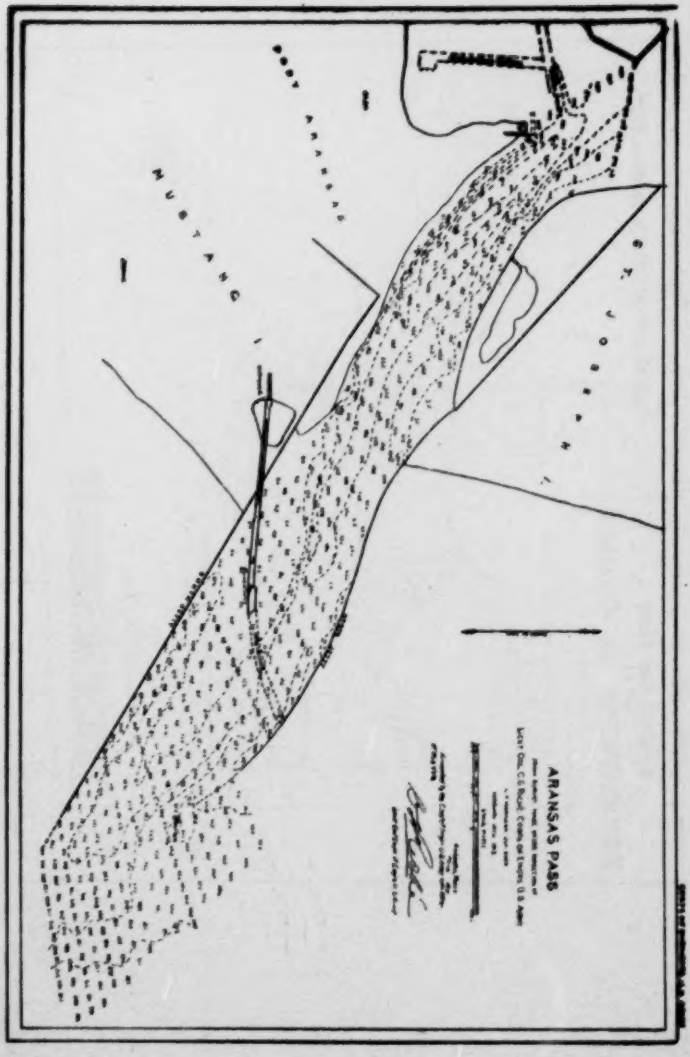
THIS TRACING REPRODUCES CURVES DRAWN ON JOURNAL AT SENEGAL BAR, AFRICA, WHICH WERE IN EXISTENCE AT THE TIME OF THE FILING OF CLAIMANT'S PATENT APPLICATION. EXHIBIT B. (SEE PERIOD 1911).



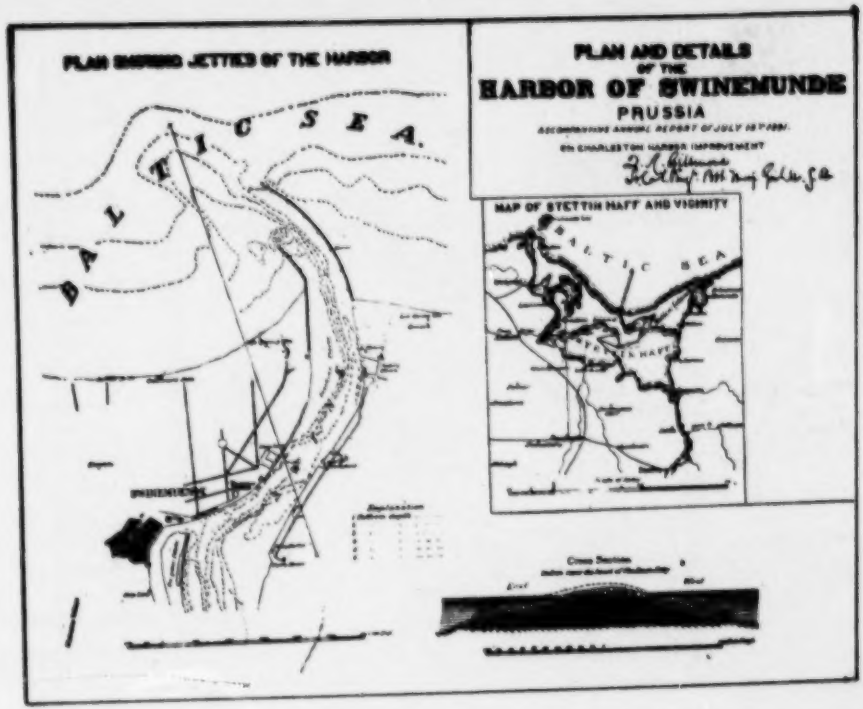
THIS DRAWING REPRESENTS THE MANSFIELD JETTY AT ARANSAS PASS, TEXAS, WHICH WAS IN EXISTENCE AT THE TIME OF THE FILING OF CLAIMANT'S PATENT APPLICATION. EXHIBIT C. (SEE FINDING XVII)



THIS DRAWING REPRESENTS THE MANSFIELD JETTY AT ARANSAS PASS, TEXAS, THE JETTY BEING NOTED AS "OLD GOVERNMENT JETTY" AND THE OUTER AND CURVED PORTIONS OF WHICH WERE REMOVED TO PREVENT INTERFERENCE BY IT WITH THE OPERATION OF THE HARBOR COMPANY REVERSED CURVE JETTY. THIS JETTY WAS IN EXISTENCE AT THE TIME OF THE FILING OF CLAIMANT'S PATENT APPLICATION. EXHIBIT D. (SEE FINDING XVII).



THIS DRAWING REPRESENTS THE CURVED DOCKS OR JETTIES AT SWINEMUNDE HARBOR, GERMANY, WHICH WERE IN EXISTENCE AT THE TIME OF THE FILING OF CLAIMANT'S PATENT APPLICATION. EXHIBIT E. (SEE FINDING XVII).



(No Model.)

E. C. G. THOMAS.

BREAKWATER.

No. 283,683. Patented Aug. 21, 1883.

FIG. 1

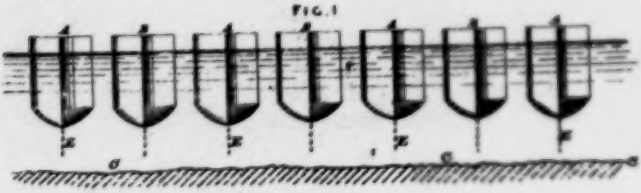


FIG. 2.

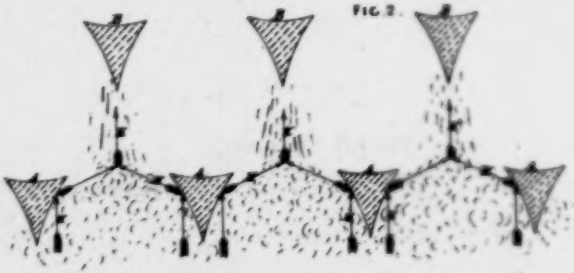


FIG. 3.

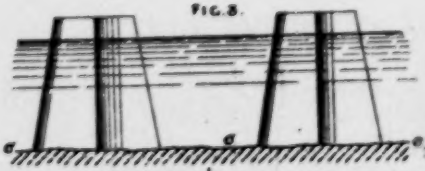


FIG. 4

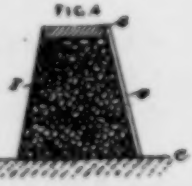


FIG. 5

FIG. 6

FIG. 7

Witnesses.
Jas. Richardson
Robert Smith

Inventor.
Edward C. G. Thomas
by James L. Norris.
Atty

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 85.

LEWIS M. HAUPT

vs.

THE UNITED STATES

REPLY BRIEF FOR APPELLANT

BENJAMIN CARTER,
Attorney for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 85.

LEWIS M. HAUPT
vs.
THE UNITED STATES

REPLY BRIEF FOR APPELLANT

This brief is filed chiefly for the purpose of making sure that, in relation to certain questions suggested by members of the court almost at the close of the hearing, the facts are correctly apprehended.

The United States did not by its dealings with the Aransas Pass Harbor Company acquire any license or other right to use a patented design

The concession given by Congress to the Aransas Pass Harbor Company (Record, p. 13) contained at the commencement this clause:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Aransas Pass Harbor Company, a corporation duly chartered under the laws of the State of Texas, and their associates, assigns, successors, and representatives be, and they are hereby, authorized on the conditions hereinafter mentioned, to construct, own, and operate such permanent and sufficient jetties and breakwaters and such auxiliary works as are necessary to create and permanently maintain, as hereinafter set forth, a navigable channel across the outer bar, which obstructs the entrance to Aransas Pass harbor. * * *."

It will be seen that the Aransas Pass Harbor Company was not created by Congress and was not an agent or instrument of Congress to accomplish an improvement such as Congress ordinarily did by direct employment, through the Corps of Engineers, of contractors. The company was created by the State of Texas for the general purpose of developing a harbor. Breakwaters and jetties were named in the charter as things which the company would have the power to construct, for which, that is to say, it might spend its stockholders' money. It had authority also to construct wharves, railroad terminals, shops, warehouses, etc. Before building jetties or anything like them in the harbor the company must needs have a permit from Congress. This permit, and nothing more, it received by the act of May 12, 1890. So far as could be derived from this concession, the only thing that could pass from the company, by its deed in any form, is this permit.

This franchise to the harbor company of May 12, 1890, contained the following, in Section 2:

"That at any time after said improvements and auxiliary works have been completed as herein provided, and said depth of twenty feet has been obtained, the United States shall have the right to pay the said company, or their assigns, successors, or legal representatives, the value of the works constructed under this act or under or by virtue of any authority granted by the State of Texas, and on such payment being made by the United States all rights to said work on the part of said parties shall cease, but nothing in this act shall be construed as compelling the Government to take possession of and pay for said works unless so desired."

There was also a proviso in this act for a certain rate of expedition in the work, for the development of a 15-feet channel within three years and, failing these, for forfeiture or revocation of the franchise.

The supplemental act of March 2, 1892 (Rec., p. 14), extended the time for completion of the work for two years after that date and provided that upon failure therein, or of the speed prescribed, Congress might revoke "the privileges herein granted."

Clearly it was not contemplated by Congress or by the Aransas Pass Harbor Company that by this franchise the company acquired, and its assigns could acquire, any right to use a patented design. Until years later there was no thought of building a patented jetty.

Whatever rights the Government may have had under these statutes, it did not by mere virtue thereof acquire the properties of the harbor company. In 1899 it preferred to deal with the company at arms length, and it took over the properties by voluntary grant of the company rather than by sequestration. Recession was accomplished by a deed conveying to

the Government "the stone breakwater which it [the company] has constructed."

The Aransas Pass Harbor Company could not and did not convey to the United States its license to use appellant's patent.

The harbor company at any time, by native right as incidental to ownership, could have conveyed to the United States or any grantee all or any of its physical properties, and it might reconvey all privileges it had received from the United States. It could not convey to the United States a mere permit which it had received from someone else.

The deed of the company did not *purport* to convey anything more than (1) one of its physical properties, viz., the breakwater, and (2) such privileges as it had received from the Government. But if the deed of recession had included in terms the license to use, in completion of the breakwater referred to, appellant's patent, this would have been of no avail.

The rule of law that, in absence of distinct stipulation in the grant, a license to use a patent is personal to the licensee, and so can not be assigned, is applied with peculiar strictness. It is held to bar even an assignment which occurs by operation of law. In this particular it differs from Section 3477 of the Revised Statutes, invalidating an assignment of a claim against the United States, as construed by this court. An "assignment" of a claim of this latter class by a receivership or by will, or by inheritance from a decedent, is operative. (*Erwin v. United States,* 97 U. S. 392; *Butler v. Goreley,* 146 U. S. 303; *Price v. Forrest,* 173 U. S. 410; *Goodman v. Niblack,* 102 U. S. 432.) It is not so with a patent license. A license given by a patentee to a corporation passes automatically to a

receiver who manages the company's business during its temporary embarrassment (*Schmidt v. Central Foundry Co.*, 218 F. R. 466), but not to a receiver who winds up the business of a corporation or individual; nor to one corporation which receives from another, in process of dissolution, an assignment of its properties, contracts and good-will.

Waterman v. Shipman, 55 F. R. 985;
Bowers v. Lake Superior Co., 149 F. R. 983;
Niagara Fire Extinguisher Co. v. Hibbard, 179 F. R. 844.

A license to use a patent terminates with the life of the licensee.

Oliver v. Chemical Co., 109 U. S. 75;
Haffcke v. Clark, 50 F. R. 531;
Rogers on Patents, Sec. 765, p. 1211;
Walker on Patents, Sec. 310.

A license to one partner gives no right to another partner except in so far as the latter may be regarded as the agent of the former.

Eclipse Windmill Co. v. Windmill Co., 24 F. R. 650;
Foster Hose Supporter Co. v. Thomas P. Taylor Co., 191 F. R. 1003.

Surely the United States, when completing the Haupt jetty under the recession of 1899, was not the agent of the Aransas Pass Harbor Company; and it seems equally clear that the harbor company, while operating under the franchise of 1890, was not the agent of the United States. In constructing this particular jetty, just as in its efforts to construct jetties previously planned, the company was serving its own ends, with no regard to the general interest of the

public or of the Government's fisc. The report of the Chief of Engineers for 1890 (Pt. 2, p. 1810) tells of the grant to the harbor company and points out that the project is no longer a Government concern, and the project, the *locus* even, disappeared from the reports therafter until in 1898.

A license to one person to construct and use a patented dry-kiln does not pass to a receiver who takes possession of the premises and conducts the business even though this latter is done under orders of the court which appointed him.

Curran v. Craig, 22 F. R. 101.

It has been held that a license to manufacture and sell an article does not give a right to use the same; that the exclusive right of use still remains in the patentee (*Atwood Lock Co. v. Yale & Towne Co.,* 115 F. R. 332; *Tuttle v. Matthews,* 28 F. R. 98). Of course no more is asserted by the present appellant than that a license to manufacture and use is not assignable to another intended manufacturer and user.

If the Government acquired from the Aransas Pass Harbor Company a right to avail of the license given to the latter by Haupt, then the Government, itself the author of the patent, took in relation to the patent, in derogation of the patentee's rights, something which, to say the least, no one else could take. At one time it was contended that in granting a patent the Government impliedly reserved to itself the right to use the patented article, design or process, but no such argument would now be entertained by any court; and here the Government can not have any right which a private person in the same situation would not have.

Of course Haupt, by words or acts at the time of the decision by Congress to avail of his patent, could have

shut himself off from asserting any claim for compensation; but his mere silence would not have had this effect. Where the user knew of the patent and the patentee knew of the use and did not object thereto, the more reasonable implication is that there was an agreement for compensation *quantum meruit.*

United States v. Palmer, 128 U. S., 269.
Walker, Sec. 312.
Berdan Firearms Company v. United States, 156 U. S., 552, and other cases cited on original brief for appellant, pp. 12-17.

This was the "Haupt jetty" after the spring of 1903, whatever it was before. At that time the Government engineer in charge, when making preparations for the new work, found it necessary to call Mr. Haupt to his assistance so that the new specifications should be substantially those under which the work of the Aransas Pass Harbor had been done (Rec., p. 19). Mr Haupt risked the jetty's success, and his own fame, on the specifications drafted by this conference. Is not the Government, in a fair sense, estopped to say it did not use Haupt's plan—did not build a "Haupt jetty"—when by availing of Haupt's skill it put accurately into effect the "design and specifications of the Aransas Pass Harbor Company?"

In this case both the real licensee and Congress were informed by the patentee on all occasions, and Congress, understood, that the patentee would expect to be paid for any use made by the Government of his patent; and there is not the slightest hint that Congress denied or doubted that his patent was already in course of use and was identified by the words "design and specifications of the Aransas Pass Harbor Co."

The later engineering reports speak of "Haupt design" or the "Haupt jetty, so-called from the name of its inventor" (Report for 1908, p. 470; House Document 5, 59th Congress, 2nd Session).

The understanding and intention of Congress (whatever they were) can be learned from testimony, referred to in the motion for remand, which has been given by Chairman Burton and Hon. John H. Bankhead, of the House Committee, and Senator Nelson, of the Senate Committee, and from officially printed reports of the committee hearings and other evidence.

Congress, when taking over a part of the property of the Aransas Pass Harbor Company, was free to say whether it would complete the patented jetty planned for, and founded by the company, or would construct some other jetty, whether involving or not involving any other patent. It was not helpless, however, to avail of the Haupt patent in case it should so elect. The Government, as a sovereign, can take and use the patented device of an individual just as it can take any of his corporeal property. The incident attaches, however, by the Constitution, that it must pay the patentee the value to it of his patent so applied.

The Government was not in any way compelled to use the patented design.

If the Government had no power to avail *gratis* of the license held by the Aransas Pass Harbor Company, it could not be under any legal obligation to complete the jetty planned in accordance therewith or in any way to make use of the patent. On the Government's part it is contended that the economies of the case,

when the new twin-jetties plan was adopted in 1907, compelled the use by the latter of the completed Haupt jetty. The fallacy of this proposition is shown by the reports of the Robert board, so-called, printed in part 2 of the Report of the Chief Engineers for 1898, commencing at page 1527, and the report of the Lockwood board of date December 22, 1906, contained in House Document 5, 59th Congress, 2nd Session. The Robert board reviewed the whole history of this improvement, criticised the Haupt jetty in a hostile spirit (as the engineers of the Corps usually did), endorsed the Ernst plan of 1888 for two jetties and said that a return to that plan would require removal of only about one thousand feet of incomplete foundation of the Haupt jetty. Captain Jadwin, author of the plan of 1906, pointed out that in proceeding with a two-jetty plan it would not be necessary at the outset to disturb the Haupt jetty, and that if this latter should be necessary it could be done on lines indicated on his charts, in connection with the extension of that structure. (House Doc. 5, Sup.) Actually, not one stone of that jetty was removed nor was it ever extended one foot at the seaward end.

Identity between Haupt's (1) original and (2) reformed plans for the Aransas Pass Harbor Company and (3) the completed north jetty.

The Government's present counsel take the impression from the findings of the Court of Claims that the plan on which the construction of the north jetty was actually done—first by Clark & Co. under employment of the harbor company and then by Henry C. Ripley and Clark & Co., under employment of the Government, after the recession—was essentially different

from the original plan proposed by Haupt to the company. If the findings are ambiguous and possibly could bear this interpretation, the Robert report and the engineering reports, again, afford an unmistakable demonstration of the real fact. The Robert board, speaking of the second plan prepared for the harbor company, said that it (like the first plan) consisted of compound and reversed curves; the only change being the omission of a part of the outer (convex) curve. On this substituted plan Clark&Co., under a contract given them by the harbor company in 1895, constructed 1250 feet of complete breakwater and 2500 feet of foundation, a total of 3750 feet. The completed structure of 1250 feet was part of the convex curve—which also included 750 feet of the foundation laid. The harbor company never completed any part of the jetty except these 1250 feet. It gave Clark & Co. two other contracts, however (1895 and 1896), and they, beside partly constructing the core on the 2500 feet of foundation, laid some foundation courses outward for 450 feet, to the extremity proposed by the second plan, and 1050 feet more. This gave to the project a total length of 5250 feet instead of 6000 feet proposed by the original plan—a difference of 750 feet in the length of the outer curve. (Report of Robert board, pp. 1527, 1528; report of Captain Jadwin, House Document 5, *supra*, pp. 1, 2.)

It is true, but not important (Rec., p. 15) that Clark & Co. did not contract to *complete* and did not complete anything but a single-curve structure.

"Anticipations" of Patent.

The Court of Claims, while mentioning some structures or studies which were in existence when Mr.

Haupt got his patent (Rec., p. 23) does not say as its own conclusion that any of these anticipated the patent and does not give this court the facts necessary for an adjudication on this point. It is evident, however, that Government counsel, who contend for these older designs as anticipations, have not understood the latter correctly. Fortunately appellant had with him at the hearing a map of the Wilmington, Calif., improvement issued by the Coast and Geodetic Survey; and this shows (1) that there was a second jetty, paralleling the one exhibited, to its outer extremity, (2) that there were spurs, connecting with or separate from the jetty exhibited, to aid it, and (3) that the purpose of this particular jetty and the spurs was to prevent the shore behind it from washing away, not to create any reaction or otherwise to scour, or help to scour a channel. Moreover it appears from published statements of the engineer (Sears) who designed this jetty that it failed to accomplish its purpose, which conclusion is corroborated by the report of an engineer afterward in charge (Transactions of American Society of Civil Engineers, Vol. V, read September 6, 1876; Report of Chief of Engineers for 1900, p. 420).

The "Mansfield jetty" also referred to by Court of Claims and counsel, which consisted of a broad curve, covering a short distance, appended to a straight line, likewise was not expected to create any reaction and scour and it failed to accomplish anything useful.

Unsuccessful and abandoned experiments do not affect the validity of subsequent patents.

Deering v. Winona Harvester Works, 155 U. S., 286.

Mineral Separation Limited, etc., v. Butte Co., 250 U. S., 336 (353).

Public documents open to the Court of Claims and to this court would show (1) that the Senegal Bar, Africa, projéct consisted of two separate training walls on opposite sides of a river (such as Mr. Haupt disclaimed in his patent), neither of which was expected to create a channel by reaction, and (2) that at Swinnemunde Harbor, Germany, there were, or were projected to be, two jetties, parallel, like those at the South pass of the Mississippi River, not applying the principle of reaction.

If it be true that in the whole world, until at Aransas Pass in the years 1899 to 1914, there never was a navigable channel created by action and reaction of currents upon and controlled by a single jetty, and that in this one instance the Government has accomplished this result by the use of a patent belonging to the present appe. ınt, should not this court incline to reimburse him, to the extent that the facts proved or provable establish a reasonable measure of damages, for his splendid contribution to an important and complex art and his great service to his country?

Attention is invited again to appellant's motion for a remand to the Court of Claims and his motion amendatory thereof. These propose, for reference to the Court of Claims, individual questions of fact which are involved in any correct solution of the issues.

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